Supreme Court of the United States.

Nos. 283 and 284.—October Term, 1906.

283. The United States, Appellant,
vs.
Lewis E. Brown.

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vs.
The United States.

} Appeals from the Court of Claims.

[May 13, 1907.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a claim for pay as first lieutenant of United States Volunteers after February 17, 1899, on which date by the sentence of a court-martial the claimant was dismissed from the service. The court-martial consisted of five members, the minimum number by the 75th and 79th Articles of War, Rev. Sts. § 1342, and the president of the court was an officer in the Regular Army. By Article 77 "officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces, except as provided in Article 78." (Article 78 has no bearing on the case.) On this ground it is contended that the proceedings were void. Even if the presence of an incompetent person as a member would not have made the proceedings invalid in any event, in this case without him there would have been no court. It has been decided that a sentence against a volunteer officer by a court composed wholly of regular officers is void, and this principle is thought to govern the present case. *McClaughry* v. *Deming*, 186 U. S. 49. On this ground the Court of Claims decided that the claimant was entitled to recover up to the time of the final muster out of his regiment on May 25, 1899, including two months' extra pay under the Act of January 12, 1899, c. 46, (30 St. 784.) 41 C. Cl. 275; ibid. 515. There are cross appeals to this Court.

The answer of the United States to the foregoing argument is that the regular officer had been granted an indefinite leave of absence from the Regular Army in order to enable him to accept a commission as Lieutenant Colonel, Second United States Volunteer Infantry, and that he was serving in the latter capacity when he sat upon the Court. It is argued that it always has been understood that under such circumstances the position in the volunteer service alone is to be regarded, that much harm will be done

if a contrary construction should be adopted now, and that the leave given to appoint regular officers to the volunteer service should be construed to carry with an appointment the same consequences that would attach to a commission if held by any one else. Act of April 22, 1898, c. 187, § 13, 30 Stat. 363. Act of May 28, 1898, c. 367, § 2, 30 Stat. 421.

This argument would have great force when it was required, as formerly, only that courts-martial for the trial of militia officers "Should be composed entirely of militia officers." Act of April 10, 1806, c. 20, art. 97, 2 Stat. 359, 371. If there was a settled practice of treating these words as satisfied if the members of the Court were militia officers, whether they also held commissions in the Regular Army or not, we well might hesitate to overthrow it. But when the express prohibition contained in Article 77 was adopted by the Revised Statutes, it made the former construction no longer possible. The words of the statute are peremptory and must be obeyed. We do not apprehend any serious consequences, in view of the date of the change. But whatever the consequences we must accept the plain meaning of plain words. It follows that the proceedings of the Court were void, and that it is not necessary to mention or consider other objections that were urged.

We are of opinion that the Court of Claims was right also in the allowances made to the claimant. In 1900 the claimant applied for an honorable discharge as of May 25, 1899, the date when his regiment was mustered out, but was refused. Of course the refusal of a certificate of honorable discharge on the ground that the applicant already has been dishonorably discharged is not an active retention of the officer in the service. The Act of March 2, 1899, c. 352, § 15, (30 Stat. 977, 981,) provided that the officers and men of the Volunteer Army should be mustered out, and under the Act of January 12, 1899, c. 46, (30 Stat. 784,) 'as far as practicable,' the discharge of officers and men was to take effect at the muster out of the organization to which they belonged. It would be monstrous to hold that it had been determined not to be practicable to discharge the claimant when his regiment was mustered out, or that the circumstances of his case, notwithstanding his technical success, afford a ground for a later claim. The claimant was allowed two months' extra pay for service outside the United States. He was not entitled to one month's extra pay for service within the United States. See Act of May 26, 1900, c. 586, 31 Stat. 205, 217. Of course, the claim for travel under the same Act (31 Stat. 210) must fail. The claimant was discharged before that Act was passed.

Judgment affirmed.

Mr. Justice MOODY did not sit and took no part in the decision.